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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

NEHEMIAH ROBINSON, Plaintiff, **v.** **T. CATLETT, et al.,** Defendants.	08-CV-00161-H (BLM) **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** Hearing: September 11, 2008 Time: 9:00 a.m. (no appearance) Courtroom: 5140 Judge: The Honorable Barbara L. Major

I

DEFENDANTS PROPERLY REQUESTED JUDICIAL NOTICE BE TAKEN OF CERTAIN DOCUMENTS

In his Request for Judicial Notice in Support of his Opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, Plaintiff asks the Court to either exclude the exhibits attached to Defendants' Motion to Dismiss the First Amended Complaint or to convert the Motion to Dismiss into a Rule 56 motion for summary judgment. (Plaintiff's Request for Judicial Notice in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint pp. 1-2.) Neither of these options are necessary because the Court may consider documents or exhibits "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading" in ruling on a motion to dismiss, without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (*overruled on other grounds by Golbraith v. County of Santa Clara*, 307 F.3d 1119, 1127); *Stone v. Writer's Guild of Am. W. Inc.*, 101 F.3d 1312, 1313-14 (9th Cir. 1996).

As noted in the moving papers, the documents defendants seek to have judicially noticed and to have considered in ruling on the Motion to Dismiss Plaintiff's First Amended Complaint are clearly referenced by Plaintiff in his First Amended Complaint. (First Amended Complaint p. 9 ¶¶ 5-6; pp. 21-22 ¶ 39; p. 18 ¶¶ 28-29; pp. 13-14 ¶¶ 16-18.) Although Plaintiff purports to challenge the records submitted as not being "true copies" (Plaintiff's Request for Judicial Notice in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint p. 2), his own Declaration in Support of Judicial Notice and his attached exhibits confirm the correctness of the copies as follows:

1) Plaintiff's Exhibit 1 is identical to Defendant's Exhibit 1, except Plaintiff's Exhibit 1 includes Plaintiff's response to the second level reviewer's action which he sent directly to Sacramento (i.e. section H)[1/] and the "Received" stamp from Sacramento. D. Bell, the litigation coordinator at Calipatria State Prison, did not receive the inmate appeal with this section completed. Thus, this section is not part of Calipatria State Prison's files.

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1. The inmate submits the informal, first and second level at the institution. If the inmate is dissatisfied with the second level review, the inmate fills out section H and submits it directly to Sacramento without going through the institution.

2) Plaintiff's Exhibit 2 is identical to Defendant's Exhibit 2, except Plaintiff's Exhibit 2 includes Plaintiff's response to the second level reviewer's action which he sent directly to Sacramento (i.e. section H) and the "Received" stamp from Sacramento. D. Bell, the litigation coordinator at Calipatria State Prison, did not receive the inmate appeal with this section completed. Thus, this section is not part of Calipatria State Prison's files.

3) Plaintiff's Exhibit 3 is identical to Defendant's Exhibit 3.

4) Plaintiff's Exhibit 4 is identical to Defendant's Exhibit 4, except Plaintiff's Exhibit 4 includes Plaintiff's response to the second level reviewer's action which he sent directly to Sacramento (i.e. section H) and the "Received" stamp from Sacramento. D. Bell, the litigation coordinator at Calipatria State Prison, did not receive the inmate appeal with this section completed. Thus, this section is not part of Calipatria State Prison's files.

Thus, in ruling on the Motion to Dismiss Plaintiff's First Amended Complaint, the Court may consider the documents referenced in Plaintiff's First Amended Complaint, whether pursuant to those copies attached as exhibits by Defendant to the Declaration of D. Bell, or pursuant to those effectively same copies[2/] attached as exhibits by Plaintiff to his Declaration in Support of his Request for Judicial Notice of those referenced documents.

II

PLAINTIFF DOES NOT DEFEAT DISMISSAL OF COUNT ONE

In his argument that Count One should not be dismissed, Plaintiff recites facts alleged in his First Amended Complaint, but does not address Defendants' argument that the inconvenience of having to more carefully get up and down from the top bunk was not a deprivation of the minimal civilized measure of life's necessities other than to make the conclusory statement that the upper bunk assignment amounted to wanton infliction of pain. (Plaintiff's Mem. of P. & A.'s pp. 7-8.) As to the equal protection claim, Plaintiff merely states that "Defendants' argument is

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2. The portions of the documents referenced in the Motion to Dismiss First Amended Complaint are the same copies in Defendants' exhibits as in Plaintiff's exhibits.

baseless and unrealistic." (*Id*. pp. 8-9.) Plaintiff similarly makes no argument as to the due process, the Americans with Disabilities Act or the Rehabilitation Act claims. (*Id*. pp. 10-12.)

III

PLAINTIFF DOES NOT DEFEAT DISMISSAL OF COUNTS TWO, THREE, OR FOUR

Plaintiff provides no argument as to Counts Two, Three, or Four besides stating that Defendants' argument is "'repeated,' baseless, unrealistic and immaterial to the claim." (*Id*. pp. 12-14.)

IV

PLAINTIFF DOES NOT DEFEAT DISMISSAL OF INJUNCTIVE RELIEF

Plaintiff claims he has alleged facts establishing a pattern, plan or policy to harass, threaten, punish or retaliate against him in connection with his request for injunctive relief simply because in his First Amended Complaint he made the allegation that "the harm is part of a pattern of officially sanctioned ... behavior." (*Id*. p. 15.) The "court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

In his First Amended Complaint, Plaintiff does not allege any facts establishing a pattern, plan or policy to harass, threaten, punish or retaliate against him in connection with his requests for injunctive relief. Therefore, the claims against Defendants in their official capacities should be dismissed along with Plaintiff's requests for injunctive relief.

CONCLUSION

Defendants respectfully request this Court dismiss Plaintiff's First Amended Complaint in its entirety without leave to amend.

Dated: August 19, 2008

Respectfully submitted,

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70133901.wpd
SD2008700357

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Nehemiah Robinson v. T. Catlett, et al.**

No.: **08-CV-00161-H (BLM)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 19, 2008, I served the attached **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Nehemiah Robinson
J-71342
Calipatria State Prison
P.O. Box 5008
Calipatria, CA 92233-5008
In Pro Per
J-71342

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 19, 2008, at San Diego, California.

Laura Ruiz	*[signature]*
Declarant	Signature

80273684.wpd